No. 96-795

In The
Supreme Court of the United States
October Term, 1996

Allentown Mack Sales and Service, Inc.,
Petitioner,
v.
National Labor Relations Board,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 75 national and international unions representing approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The question in this case is whether the National Labor Relations Board's rule limiting employer polls regarding employee support of incumbent unions to those circumstances in which an employer has a reasonable belief based on objective evidence that a majority of the employees no longer desire union representation is reasonable and consistent with the National Labor Relations Act.

A. The NLRA on its face provides only one route for employers who question whether an incumbent union continues to enjoy majority support to obtain an answer to that question, and, if the answer is "no", to withdraw recognition from the union. NLRA § 9(c)(1)(A), 29 U.S.C. § 159(c)(1)(A) provides that an employer may file a petition for a Board decertification election and, if a majority of employees vote against union representation, withdraw recognition. And, NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5), establishing the employer's obligation to bargain with a majority representative, contains no *scienter* limitation on that obligation. If anything, then, the Board's "good faith doubt" polling/unilateral withdrawal of recognition rule gives more, not less, rein to unilateral employer self-help in ending bargaining relationships than the Act provides in terms.

This conclusion is reinforced by *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974), in which this Court affirmed the Board's rule, altering an earlier position to the contrary, that employers can lawfully refuse to accord initial recognition to unions which, on every objective basis, have obtained and demonstrated majority employee support, but which have not prevailed in an NLRB representation election. The same considerations that led the Board and this Court to privilege exclusive employer reliance on Board elections in the initial recognition situation favor principal reliance on Board elections as the

means of ending a bargaining relationship once established. Indeed, in the withdrawal of recognition context there is an additional factor that militates against a broad privilege for employer unilateral actions predicated on the employer's belief that an incumbent union no longer has majority employee support: that "the Board is entitled to suspiction when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one." *Auciello Iron Works, Inc. v. NLRB*, 116 S. Ct. 1754, 1760 (1996).

Given this statutory scheme, the NLRB has no obligation freely to permit unilateral employer actions in withdrawing recognition from an incumbent union, thereby diminishing the paramount role of Board decertification elections in that regard.

B. Employer polls testing employee majority support of incumbent unions are moreover a direct threat to the employees' right of self-organization, and are properly limited to a very narrow range of circumstances for that reason as well.

Employer polls are conducted by an interested party that, unlike the NLRB, will be affected by the outcome, and is likely to favor one outcome—repudiation of union representation—over the other. Even where the employer poll is, as NLRB standards require, conducted by secret ballot, employer control over the entire voting process and the absence of the assurances of accuracy provided by the Board election processes undermine both the actual and the perceived reliability of the results.

The inherent faults of employer polls, and their potential for interference with employee self-organization, are at their height when the poll is conducted not in the initial organization context but to test the continuing employee majority support of an incumbent union. In the incumbent union context, simply by raising the issue

whether the status quo should change, the employer skews the balance by taking an action that can only be taken as an expression of the employer's own desire to be free of his bargaining obligation, interrupts that relationship, and creates internal employee divisiveness that can only destabilize that relationship further. And, of course, once the employer has withdrawn recognition based on an employer poll, the status quo regarding union representation is changed—and changed in a way that greatly weakens the union and the bargaining system in the employees' eyes. A Board election after the fact does not therefore provide a practical way of correcting any deficiencies in the employer poll.

C. Given the primacy of Board elections in the statutory scheme and the dangers to employee self-organization and to stable bargaining relationships posed by employer polls regarding an incumbent union's support, the Board's current rules regarding employer polling are both reasonable and consistent with the Act. Those rules permit employer polling to check other indications of loss of majority employee support for the union, a limited but useful purpose for employers who have a disinterested reason for ascertaining the employees' desides. Where that Board employer polling standard is met, the special dangers of employer polls are somewhat mitigated; where it is not, permitting polling creates a potent means for undermining lawful established bargaining relationships.

D. The Board's set of rules governing employer withdrawal of recognition from incumbent unions is not without flaws. But those flaws point in the direction of contracting, not expanding, the circumstances in which employer polling to test employee majority support for incumbent union as a way station to a unilateral employer withdrawal of recognition is permitted. As this Court has pointed out, "there is nothing unreasonable in giving a short leash to the employer as the vindicator of its employees' organizational fredom." *Auciello, supra*, 116 S. Ct. at 1760.

ARGUMENT

The Employer sets up its argument in this case through the following summary of a set of the relevant National Relations Act ("NLRA") decisional rules.

> Under Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), a union that represented the employees of an asset seller is presumed to represent the employees of the buyer, if a majority of the employees hired by the buyer previously worked for the seller. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). . . . The new employer can rebut the presumption of majority support and withdraw recognition by showing (1) that the union did not in fact enjoy majority support, or (2) that the employer had a good faith doubt, found on a sufficient objective basis, of the union's majority support. *Harley-Davidson Transportation Co.*, 273 N.L.R.B. 1531 (1985) . . . *See also NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 779 (1990). . . . A withdrawal of recognition can be based on the results of a poll. *See, e.g., Paper Board Cores, Inc. of Ala.*, 292 N.L.R.B. 995, 1001-02 (1989). . . . In *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974), the Board held that an employer must have good faith doubt, based on objective considerations, as to the union's continuing majority status in order to conduct a poll. . . . [Brief for Petitioner ("Pet. Br.") at 9, 12.]

On the basis of this summary, the Employer maintains that the Board uses the "same standard" to determine whether an employer has sufficient evidence to conduct a poll as the Board uses "to determine whether there is sufficient evidence to process an employer-filed decertification petition (RM petition) or to determine whether an employer can lawfully withdraw recognition from a union." Pet. Br. at 13. And, the Employer further maintains that in order to "revitalize[] the good faith doubt branch of the withdrawal of recognition standard" (*id.*), the National Labor Relations Board ("NLRB") is *re-*

quired by the Act to allow employers to poll on less evidence showing a loss of employee support for their chosen union representative than the Board requires now.

In a nutshell, the employer-side argument that the Board's current approach is contrary to law and not within the range of the Board's discretion is: (1) that employers have some statutory right and/or obligation to involve themselves in their employees' decision whether to continue, or to end, the incumbent union's representative status; (2) that the Board only permits employers to withdraw recognition unilaterally if the employer acts on objective evidence supporting a reasonable belief that the union no longer enjoys majority support; (3) that employer-sponsored and administered polls are the most useful means of securing such evidence; and (4) that the Board therefore may not limit such polling with regard to employee support of incumbent unions to the narrow circumstances in which "the only value of the poll would be to double check" other evidence sufficient to support a reasonable belief that a majority of the employees no longer support their union representative. Pet. Br. at 14, quoting *Thomas Industries v. NLRB*, 687 F.2d 863, 867 (6th Cir. 1982).

The D.C. Circuit's succinct answer to this line of argument was "we do not understand why the [courts which have disapproved the Board's "incumbent union" polling standard] thought there was something wrong in the Board's having a standard that rendered polling only marginally useful to employers." *Allentown Mack Sales & Service v. NLRB*, 83 F.3d 1483, 1486 (D.C. Cir. 1996).

The Court of Appeals was quite right to be perplexed, for the employer argument outlined above has no predicate in the NLRA's language, structure, legislative history, or purposes. As we show, nothing in the NLRA requires that the Board provide *any* means for employer involvement in the employees' determination as to whether the

employees choose to continue, or to end, their union's representative status other than the means stated in NLRA § 9(c)(1)(B), 29 U.S.C. § 159(c)(1)(B). That section provides for a Board-conducted election, with Board-determined safeguards, on a proper employer petition.[2]

The Board has nonetheless, in an exercise of its administrative discretion, recognized some limited employer privilege, where there has been no Board conducted decertification election, to withdraw recognition from an incumbent union on the basis that a majority of the employees—in the employer's opinion—do not support the union.

Nothing in the statute requires that privilege, or mandates that the Board make the privilege broadly, rather than narrowly, available to employers who have some basis for thinking that their employees may no longer desire union representation.

Moreover, the Board has provided perfectly cogent, detailed explanations, over the years, for concluding that employer-run elections generally, including employer polls, are less accurate than Board-conducted elections and are for that reason, as well as others, likely to interfere with employee self-organization, and for regarding employer

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[2] "Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative [of a majority of the employees in the unit] . . . the Board shall investigate such petition and, if it has reasonable cause to believe that a question of representation affecting commerce exists," shall hold a hearing and, if there is a question concerning representation, "shall direct an election by secret ballot and shall certify the results thereof."

The statute also provides for Board elections at the behest of "a group of employees" who "assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a [majority] representative . . ."

polling with respect to the majority status of incumbent unions as particularly problematic.

Specifically, the NLRB's consistent position, reaffirmed in *Texas Petrochemicals Corp.*, 296 NLRB 1057 (1989), has been (1) that such employer polls "interfere with . . . rights guaranteed in [§ 7 of the NLRA, 29 U.S.C. § 157]" within the meaning of § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), except in the unusual circumstance in which the employer has reason to believe, based on objective evidence, that a majority of the employees in the relevant bargaining unit no longer support the union; and (2) that an employer who refuses to bargain with an incumbent union on the basis of an employer poll not within the narrow exception violates § 8(a)(5), 29 U.S.C. § 158(a)(5).

The Board's conclusion that employer polls questioning the employees' continued majority support of incumbent unions should be permitted only in very limited circumstances is well-grounded in the statute and in reason. Indeed, the Board's limitations on employer polling in support of unilateral employer withdrawals of recognition are at least as much the result of a permissible exercise of the Board's "authority to formulate rules to fill the interstices of the broad statutory provisions" (*Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978)), as the underlying rule permitting such unilateral withdrawals of recognition. And since "[t]he only issue here relates to [the] polling [standard]" (83 F.3d at 1487), these considerations, elucidated below, provide a more than sufficient basis for affirming that standard, the Employer's attempt to drag in issues concerning the precise standards governing employer "RM" decertification petitions and unilateral employer withdrawals of recognition notwithstanding.

A. The Employer's argument rests on the premise that the Board's polling rule is improper because the rule limits the circumstances in which employers may unilaterally

withdraw recognition from an incumbent union without invoking the RM decertification provisions of the Act. But, it is far from clear that the NLRA provides for any such unilateral employer privilege—based upon the employer's beliefs concerning the employees' desires on continued union representation—to terminate the continuing statutory duty to recognize and bargain with a union duly designated by the employees as their exclusive representative, much less for the broader privilege the Employer here asserts. *See NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 779 (1990), Brief for the American Federation of Labor and Congress of Industrial Relations as *Amicus Curiae* Supporting Petitioners in *Curtin Matheson, supra.*[8]

The parties to this case have, however, assumed that it is a permissible construction of the NLRA for the Board to privilege employers at certain times and under certain conditions unilaterally to terminate their duty to recognize and bargain with an incumbent exclusive representative, based upon the employer's good faith doubt of the union's majority support, and we therefore do so as well.

But that assumption does not change the fact that both the "good faith doubt" rule and the "unilateral employer withdrawal of recognition" rule are creatures of the NLRB's administrative discretion, rather than creatures of the Act itself, and that fact is, we submit, of paramount significance in evaluating the Employer's argument that the Board's "good faith doubt" rules as applied to employer polling are contrary to law.

1. By its terms, NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) provides that

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[8] In *Curtin Matheson*, this Court specifically "declined to address that issue," as both parties in that case assumed the existence of such an employer privilege, and it was challenged only by the AFL-CIO as *amicus curiae*. 494 U.S. at 788 n.7. The issue is now *sub judice* before the Board itself in *Chelsea Industries, Inc.*, NLRB No. 7-CA-36846.

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 9(a).

NLRA § 9(a), 29 U.S.C. § 159(a), in turn, provides that

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representative of the employees in such unit for the purposes of collective bargaining.

Taken together, then, these two provisions obligate employers to bargain with representatives "designated or selected . . . by the majority" of the employees in appropriate bargaining units.

Once so designated or selected, the exclusive representative enjoys a conclusive presumption of majority support during certain periods, including the term (up to three years) of a collective bargaining agreement, and a rebuttable presumption of such support otherwise. *Auciello Iron Works, Inc. v. NLRB*, 116 S. Ct. 1754, 1758 (1996). Here, the rebuttable presumption is applicable, since no collective bargaining agreement is in place. That presumption "enable[s] a union to concentrate on obtaining and fairly administering a collective bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 39 (1987). And, as the Court has emphasized, that presumption is of particular importance in a situation such as this one, where there is a successor employer who has hired a majority of the predecessor's employees:

> The rationale behind the presumption [of majority support] is particularly pertinent in the successorship situation. . . . During a transition between employers, a union is in a peculiarly vulnerable position. It has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it. While being concerned with the future of its members with the new employer, the union also must protect whatever rights still exist for its members under the collective bargaining agreement with the predecessor employer. Accordingly, during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor. [482 U.S. at 39.]

At the same time, the NLRA does provide a direct route through which an employer who questions whether an incumbent union indeed continues to enjoy majority support can petition for an NLRB-conducted representation election to test the employees' desire for continued representation, NLRA § 9(c)(1)(B), as well as a procedure through which disaffected employees can petition for such an election, NLRA § 9(c)(1)(A)(ii). In either event, the NLRB is instructed by § 9(c)(1) to "investigate such petition" and, if the Board finds that "a question of representation exists," the Board is to "direct an election by secret ballot."[4]

If, in such an election, a majority of the employees vote against representation by the incumbent union, the NLRB "shall certify the results"; doing so terminates the union's status as the employees' § 9(a) exclusive representative. And, since the § 8(a)(5) duty to bargain is "subject to

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[4] In this context, as in the context of petitions filed in initial recognition situations, the NLRB has developed a set of rules for determining whether a "question of representation" exists and an election should be held. Generally speaking, if a petition is filed by employees, the NLRB requires a 30% "showing of interest" (the same showing required in the initial recognition election setting); if a petition is filed by an employer questioning an incumbent union's continuing majority support, the NLRB requires—in lieu of employee signatures—an employer showing of his basis for believing that the employees no longer desire union representation. *See United States Gypsum Co.*, 157 NLRB 652 (1966).

§ 9(a)," an NLRB certification that the union no longer has majority employee support terminates the employer's bargaining duty as well.

The § 9(c)(1) procedure is the *only* procedure Congress wrote into the Act by which the continuing employer duty to recognize and bargain with a union that has been "designated or selected" by the employer's employees may be terminated. And the entire point of this procedure—indeed, the basic point of the Act—is to create a regime of "freedom of choice and majority rule in *employee* selection of representatives." *Garment Workers v. Labor Board*, 366 U.S. 731, 739 (1961) (emphasis added).

Thus, a rule allowing unilateral employer withdrawals of recognition upon a showing of good faith doubt is doubly suspect. First of all, such a withdrawal rule creates a means by which employers can terminate a union's representative status and the employer's own duty to recognize and bargain *in addition to the one provided for in the Act*, and does so without any statutory predicate. Second, the good faith doubt rule, by focusing on the reasonableness of the *employer's* belief as to the *employees'* desires rather than on the *employees' real* desires, permits majority employee sentiment to be frustrated where the employer's doubt is reasonable but *wrong, viz.*, where the employees in fact still desire union representation despite the employer's reasonable belief to the contrary. The language of § 8(a)(5), quoted above, certainly does not suggest any such *scienter* limitation on the employer's obligation to bargain with "the [§ 9(a)] representative of his employees."

If anything, then, the good faith doubt rule runs *against* the grain of the statute. At a minimum, nothing in the statute commands that the Board expand rather than narrow the circumstances in which employers may refuse to continue to recognize and bargain with an incumbent union based simply on the employer's belief, reasonable or otherwise, about the employees' desires concerning union representation.

2. There is also a tension between the rule allowing unilateral employer withdrawal of recognition upon a showing of good faith doubt and the decisions of the NLRB and of this Court concerning the rules governing the initial recognition of a union as an exclusive bargaining representative.

There was a time when the Board was of the view that such means of establishing majority support as authorization cards, responses by employees to a poll, or participation by employees in a strike for recognition were on a par with a Board-conducted representation election. Under this regime, as announced in *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), *enf'd as modified*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951), where an employer had no "bona fide doubt" as to such a showing of majority support by a union seeking recognition, the employer was obligated to recognize and bargain with the union forthwith and could not insist upon a representation election. 85 NLRB at 1265.

The "good faith doubt" rule as to when an employer lawfully may *withdraw* recognition of an incumbent union unilaterally originated as a direct corollary of the *Joy Silk Mills* rule. In *Celanese Corp.*, 95 NLRB 664 (1951), the Board "could find no reason in law or policy which calls for the conclusion that a good faith doubt of majority is no defense to a refusal to bargain after the certificate year any more than is true in cases where there is no certificate." *Id.* at 672 n.16.[5] On that basis the Board concluded that good faith doubt should be the test not only for whether an employer's

[5] In this case, there was no initial certification but rather an informal recognition. That consideration does not alter the analysis, however, since, as *Celanese* shows, formal certification raises an absolute bar to a new election and to withdrawal of recognition for one year ("the certificate year"), but after that year is over raises only a presumption of majority support to the same degree, but no more, as voluntary employer recognition.

refusal to extend initial recognition to a union claiming majority support is lawful but also for whether an employer's refusal to continue to recognize such a union is lawful.[6]

In *Linden Lumber Division*, 190 NLRB 718, 721 (1971), *rev'd*, 487 F.2d 1099 (D.C. Cir. 1973), *rev'd*, 419 U.S. 301 (1974), the NLRB overturned *Joy Silk Mills* and held that employers can lawfully refuse to accord initial recognition to unions which, on every objective basis, have obtained and demonstrated majority support but which have not prevailed in an NLRB-run certification election. The Board's decision adopting this rule was sustained by this Court on appeal in *Linden Lumber Division v. NLRB*, *supra*.

The *Linden Lumber* rule rests on a complex of considerations. In part it is an expression of the concern—expressed by this Court one year before the Board decided *Linden Lumber*—that such employee actions as participating, or refusing to participate, in a union-called recognition strike are not sufficiently reliable indicia of the employees' desires on the question of union representation as to form a basis for required union recognition. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 604-09 (1969). Beyond that, the *Linden Lumber* rule reflects the understanding that a representation "election is a solemn . . . . occasion, conducted under safeguards to voluntary choice" (*Brooks v. Labor Board*, 348 U.S. 96, 99 (1954)); that the Board's election processes assure, as more informal means do not, that both the union and the employer have an opportunity to present their views to the electorate and to respond to each other's claims (*Gissel*, 395 U.S. at 602); and that, in

[6] *Celanese Corp.* modified *United States Gypsum Co.*, 90 NLRB 964 (1950), in which the Board had indicated that because "an employer who, in good faith, doubts the continuing status of his employees' bargaining representative may resolve such doubt by filing an employer petition," the employer ordnarily is not free to act unilaterally in withdrawing recognition. *Id.*, at 966.

consequence, the NLRA representation election system provides the surest means of avoiding decisions which are "the result of group pressures and not individual decisions" (*id.* at 602). Finally, the Board, and this Court, regarded it as appropriate to place the burden of seeking a Board election upon the party seeking to change the *status quo*—in the initial recognition situation, the union. *Linden Lumber*, *supra*, 419 U.S. at 307.

3. Despite the common origin of the *Joy Silk Mills* rule, which was repudiated by the Board in *Linden Lumber*, and the *Celanese* rule, the Board has not revisited the validity of the latter.[7] This Court's cases and the considerations underlying *Linden Lumber*, however, indicate at the very least that Board elections are the vastly preferable way for ending, as well as for beginning, bargaining relationships under the Act.

Unlike the rules governing most elections held in the American political system, the NLRA's provisions "do[] not say how long a certificate of representation shall stand good." *NLRB v. Whittier Mills Co.*, 111 F.2d 474, 478 (5th Cir. 1940). It has long been understood, however, that a Board certification (or voluntary employer recognition)

> is not intended to be ephemeral, nor should it be perpetual. On general principle, since *it ascertains a status as existing*, the presumtion is that that status continues until *shown to have ceased*. The employer is, in theory at least, not much concerned since the employees are to choose their representative unhindered. So long as *the employees* make no contention that they are not correctly represented, it would seem that the employer could safely continue to deal indefinitely with the designated bargaining agent [111 F.2d at 478 (emphasis added).]

[7] As noted (n.3, *supra*), there is a case currently pending in which the General Counsel is requesting that the Board revisit *Celanese*.

Thus, while "[t]he Act recognizes that employee support for a certified bargaining representative may be eroded by changed circumstances" (*NLRB v. Financial Institutions Employees ("FIEA")*, 475 U.S. 192, 198 (1986)), the NLRA does not require that an incumbent union reestablish its majority support periodically, much less that the union must do so whenever the employer chooses to question that majority. Rather, as this Court also held in *FIEA*, the Act provides for an orderly procedure for revoking a previous bargaining authorization, and places the burden for invoking that procedure upon *those seeking the revocation*:

> In such cases, employees may petition the Board for another election, alleging that the certified representative no longer enjoys majority support. 29 U.S.C. § 159(c)(1)(A)(ii); 29 CFR §§ 101.17, 102.60(A) (1985). Similarly, an employer who questions whether a majority of employees continue to support a certified union may petition for another election. 29 U.S.C. § 159(c)(1)(B); 29 CFR § 101.171102.60(a) (1985); see 1 C. Morris, The Developing Labor Law 349 (2d ed. 1983). The employer, however, must "demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status." *United States Gypsum Co.*, 157 NLRB 652, 656 (1966); 29 CFR 101.17 (1985); see Morris, *supra*. Again, if the Board determines, after investigation and hearing, that a question of representation exists, it directs an election by secret ballot and certifies the result. 29 U.S.C. § 159(c). [*FIEA*, 475 U.S. at 198.]

And, as the *FIEA* Court also indicated, it is contrary to the statutory scheme to permit established bargaining relationships to be disestablished by less rigorous and reliable means, such as employer self-help on the basis of employer polls not subject to the Board's election rules or supervision:

> Under the Act, the certified union must be recognized as the exclusive representative of all employees in the bargaining unit, and the Board cannot discontinue that recognition without determining that the [situation is one which] raises a question of representation and if so conducting an election to decide whether the certified union still is the choice of a majority of the unit.
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> *Any uncertainty on the employer's part does not relieve him of his obligation to bargain collectively.* "If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief. . . ." [*FIEA*, 475 U.S. at 202, 209, quoting *Brooks v. Labor Board*, 348 U.S. at 103 (emphasis added).][8]

As *FIEA* suggests, the considerations that have led the Board and this Court to accord primacy to the NLRA representation election procedure apply with equal force where questions arise as to an incumbent union's continuing majority status. The termination of a bargaining relationship is as weighty a matter as the initiation of such a relationship and thus calls for "a procedure no less solemn than that of the initial designation." *Brooks v. Labor Board*, 348 U.S. at 99. Evidence of anti-union sentiment by union-represented employees expressed outside of the NLRA representation election system is no less ambiguous or unreliable than evidence of pro-union sentiment by unorganized employees. And, the lack of Board supervision and of well-developed rules governing both the pre-election campaign period and the conduct of the election itself can

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[8] This Court has, as noted earlier, recognized that the Board has administratively added to the provisions for withdrawing majority support that appear in the statute. *FIEA*, 475 U.S. at 200, n.8; *Curtin Matheson*, *supra*; *Auciello*, *supra*, 116 S. Ct. at 1758. As the quotations from *FIEA* quoted in the text indicate, however, this Court has nonetheless regarded Board elections as the primary, if not the only, route for negating the obligation to bargain with an incumbent union.

only create doubt as to the honesty and reliability of such an employer test of employee sentiment.

Indeed, in the withdrawal of recognition context there is at least one additional consideration that militates against according employers a broad privilege to act on their beliefs as to the employees' choice on union representation. As this Court has several times recognized, an employer who questions a union's continuing majority status "[i]n effect . . . seeks to vindicate the rights of his employees to select their bargaining representative." *Brooks v. Labor Board*, 348 U.S. at 103; *see also Auciello, supra*, 116 S. Ct. at 1760 (quoting *Brooks*). But employers are suspect champions of employee rights. Employers have obvious interests of their own that have nothing to do with vindicating employee free choice and everything to do with vindicating the employer's desire to operate non-union.

To be sure, in this case the Employer maintains that it is in fact seeking to advance not its employees' rights but "its own right under the Act not to bargain with a minority union." Pet. Br. at 27. There is no such open-ended NLRA right. Sections 8(a)(1) and (2) of the Act do, or course, prohibit employers from "a grant of exclusive recognition to a minority union." *Garment Workers, supra*, 366 U.S. at 738. But *Garment Workers* advances the interest of *employees* in their free choice of a bargaining representative, not any employer self-interest to be free of a bargaining obligation. And, this Court only last year rejected the proposition that the *Garment Workers* principle privileges *or* obligates "employer[s] [to] refuse to bargain whenever presented with evidence that their employees no longer support their certified union." *Auciello, supra*, 116 S. Ct. at 1760. Rather, once a union has properly obtained exclusive recognition, the union enjoys a rebuttable presumption of majority support (*id.*), and the employer is ordinarily protected by that presumption from committing an unfair labor practice as long as the

bargaining unit employees do not initiate decertification of the Union by the Board (*id.*). The proposition that employers *need* a broad privilege to unilaterally withdraw recognition from an incumbent union in order to protect themselves from a finding of having violated § 8(a)(2) by reason of their continued recognition of a minority union, rather than *want* such a privilege in order to forward their own institutional interest in being non-union, is further belied by the fact that an employer who does negotiate with a minority union, whether because he is mistaken about the union's majority support or otherwise, is not subject to any penalty or to any financial liability, but only to a prospective remedial order. *Garment Workers*, 366 U.S. at 740.

In sum, the only employer right recognized by the Act at all relevant here—and that is to stretch the term "right" to its limit—is the employer "right" to file an RM decertification petition and not to bargain with a union that the Board certifies is no longer a majority representative.[9]

Since "the Board is . . . entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to a decertification petition from the workers if they want to file one" (*Auciello, supra*, 116 S. Ct. at 1760), the Board is also entitled—at the very least—to structure the means of determining the continuing majority employee support for an incumbent union so as to provide a paramount place

[9] We are not aware of *any* case in which the Board has found that an employer has committed an unfair labor practice by continuing to bargain with an incumbent union, where no rival union is claiming majority support. And, as noted, an employer can seek an RM election based on evidence that the union lacks majority support. An employer who does so and fails to obtain an election because the Board concludes that there is insufficient evidence of loss of majority support to raise a "question concerning representation" safeguards himself against being found to have violated the Act by reason of his continued bargaining with the incumbent union. There is, in short, no statutory imperative to employer self help.

to the only such means provided by the statute, employee-initiated or employer-initiated Board-supervised decertification elections.

All of the foregoing demonstrates that the Employer's claim that the Board has some statutory obligation to provide employers an enhanced opportunity to unilaterally withdraw recognition from incumbent unions by freely permitting employer polls of their employees' union sentiments is at odds with the statutory scheme.

B. It is also to the point that employer polls regarding the employees' support for their incumbent unions are a direct threat to employee rights and are properly limited to a very narrow range of circumstances for that reason as well.

1. The NLRA makes it an unfair labor practice for an employer not only to "restrain" or "coerce" employees in their "right to *self*-organization," but also to "interfere with" that right. NLRA §§ 7 & 8(a)(1) (emphasis added).

The Board took the position at an early point that any form of employer-instigated inquiry into "the extent to which his employees have chosen to engage in union organization" can be seen as "intermeddling [or] intrusion" into "an area guaranteed to be exclusively the business and concern of his employees," and therefore employer "interference" proscribed by the Act. *Standard-Coosa-Thatcher Co.*, 85 NLRB 1358 (1949).

Under the *Joy Silk Mills* regime, however, an employer *did* have at least one strong, legitimate reason for determining the wishes of its employees regarding union representation. An employer faced with a union claim of majority employee support and a recognition request committed an unfair labor practice by failing to bargain with that union absent a good faith, objectively grounded doubt of the claim. In that one situation, then, the governing law all but required employers to ascertain their employees'

representational desires. That being so, the Board concluded that an employer can inquire into those desires without committing an unfair labor practice, provided there are adequate safeguards to assuage fears of reprisal. *Blue Flash Express, Inc.*, 100 NLRB 591 (1954). Those safeguards, as fully developed with regard to formal employer polls, included a purpose limited to "determin[ing] the truth of a union's claim of majority," communication of that purpose, a secret ballot, assurances against reprisals, and the absence of a "coercive atmosphere." *Struknes Construction Co.*, 165 NLRB 1062, 1063 (1967).

2. At the same time, from the earliest days of the Act, the NLRB "invariably followed the policy of disregarding in representation cases the results of elections conducted by employers," because "experience has shown" that an employer-run election is much less trustworthy than one conducted by the Board itself. *In re The Heller Brothers Company of Newcomerstown*, 7 NLRB 646, 657 (1938).[10]

The obvious difference between a Board election and an employer election (or employer poll), but one which deserves to be underscored, is that the employer, unlike the Board, is an interested party that will be affected by the outcome. The employer is indeed quite likely to have an interest in one particular outcome—repudiation of union representation. Related to that reality is the fact that even where that is not the case and the employer has no concern other than a fair reading of its employees' desires, employees are likely to perceive, or to fear, an employer bias toward a "no" vote. And, because the employer, unlike the Board, has a continuing relationship with the employees and power to affect their economic security, employees are likely to act upon their perception of the employer's wishes.

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[10] A union that loses a *Struknes* poll, for example, is not barred from seeking a Board election, although a loss in a Board election does preclude another election for a year.

The secret ballot requirement of *Struknes* was designed, it is true, to alleviate some of these concerns, by eliminating any direct employer knowledge of the votes of *individual* employees. But the employees may well have little confidence in the trappings of secrecy where the election is under the ultimate control of the employer. *The Heller Bros., supra,* 7 NLRB at 657 (noting the "possibility of hidden identification marks on the ballots" as one reason that employer control over the election process "preclude[s] the casting of a ballot which registers the free and independent choice of the employee"). While Board election procedures provide for election observers from all participating parties, thereby promoting confidence in the conduct of the election, employer polls are unlikely to provide similar protections. Unilateral employer control over all aspects of the election, including preparation of the ballot box, counting of the votes outside the sight of any union or employee observers, and post-election possession of the poll materials, all tend to exacerbate such concerns, and to undermine respect for the outcome of the vote as well.

Further, and critically, the presence or absence of majority employee support is not an abstract and relatively permanent attribute, any more than are the views of the electorate in a public election. Rather, the outcome of an inquiry into employees' union sentiment may turn in large part both on the opportunity of interested parties to explain their positions and to the manner in which the vote is conducted. And, running an election is not a mere ministerial task, but one that entails all manner of choices —choices an interested party is likely to skew, however subtly, toward the desired result.

Control over the precise timing and place of an election or poll, for example, can be exercised in a manner affecting the vote's outcome: The employer may wish to maximize or minimize the time for pre-poll campaigning; there may be considerations that affect which employees are likely to vote, such as planned vacations or work schedules; in large or multi-location workplaces, or where many

of the employees do much of their work off-site, the precise location of the polling place may have an impact on who votes, thereby affecting the outcome; and given the likely fluctuation in union support from day-to-day depending on workplace circumstances, the employer may be able to schedule the poll to coincide with some events likely to decrease union support (such as a failure to reach agreement at the bargaining table).

There are also likely to be disagreements concerning which employees are members of the appropriate unit and may be part of the poll. By deciding who is a supervisor and who is not, whether or not temporary or part-time employees can vote, and whether certain positions are or are not within the bargaining unit, the employer can affect the outcome of the poll and, just as importantly, may by their decisions communicate to the employees allowed to vote that the process is one designed to yield a foreordained result. Indeed, the very wording of the ballot question provides a means of signaling the result sought, and of skewing the outcome. *See, e.g., Cleveland Sales Co.*, 292 NLRB 1151 (1989) ("Do you think that Clesco still needs a union?"); *Hajoca Corp. v. NLRB*, 872 F.2d 1169 (3d Cir. 1989) (asked of strike replacement workers, "Do you consider Local 312 to be your representative?").

Finally, Board procedures provide affirmative protections developed over the years to promote an informed electorate and maximum voter participation. *See, e.g.,* 2 NLRB Casehandling Manual, Pt. 2, Representation Proceedings ("NLRB Manual"), at § 11302 (date, time and place of the election are selected to ensure maximum employee participation).[11] Employers conducting polls are unlikely to do the same.

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[11] Election notices are posted at least three working days prior to the election on the employer's premises; all parties are given a list of the names and addresses of eligible voters some time in advance of the election so as to facilitate communication with voters. NLRB Manual at 11312.1.

In a Board election, the union and the employer both have the opportunity to put a premium on strategic considerations in formulating their positions on the kinds of issues outlined above, but the neutral government agency, not the participants in the dispute, makes the ultimate decisions. And, the Board's goal in making its decisions is not to maximize the opportunity for one side or the other to prevail, but to provide the fairest and most accurate test of the employees' well-considered views concerning union representation. An employer poll is supremely unlikely to have the same goal, and in that respect as well as the others discussed above "interferes with" the employees' self-organizational rights.

In sum, as the Board has long recognized, in labor relations as in quantum mechanics an uncertainty principle is at work: employer "measurements" of employee sentiment on union representation do not accurately record that sentiment as it was—and as it would continue to be —absent the measurement; instead the employer's action, by its nature, changes the thing being measured—and by reason of that effect interferes with the employee right of self organization.

3. The faults of employer polls, and their inherent tendency to interfere with employee § 7 rights, are all greatly exacerbated when the poll is conducted not in the initial organizing context, as in *Struknes, supra*, but to test the continuing majority status of an incumbent union, as here. *See generally Montgomery Ward & Co.*, 210 NLRB 717, 723-725 (1974) (ALJ Opinion); *Texas Petrochemicals Corp.*, 296 NLRB 1057, 1061-62.

In the initial recognition context, an employer faced with a demand for union recognition can simply refuse to bargain, no matter how strong the evidence of union support, and await the filing of an election petition by the union. *Linden Lumber, supra.* By polling, the employer in that context binds itself to the results of the poll if the union wins (*Atlantic Technical Services Corp.*, 202 NLRB 169 (1973)) and may end up bargaining with the union sooner rather than later, while the union is free to file for

a Board election should the employer poll result in a union loss. A vote against the union in such an employer poll will not result in any change in the status quo regarding union representation, so the very fact of a union loss will have no major impact on the role of the union during the pendency of any Board representation election that may follow. An employer who conducts a poll during an initial organizing campaign, consequently, does nothing to further his employer interests insofar as those diverge from the employee interests protected by § 7. And, that reality strengthens the case for the proposition that such employers may well be seeking nothing more than a prompt, informal resolution of the union representation question.

Where there is an incumbent union entitled to a presumption of majority support, however, the incentives facing an employer are entirely different. Simply raising the issue whether the status quo should be changed interrupts the established collective bargaining relationship by putting the union's status in question and requiring the union to concentrate on maintaining its representational rights rather than on representing the employees. And, putting the question of repudiating union representation to employees may lead to internal disagreements among the employees on a question they had regarded as settled, thereby undermining their internal cohesion and destabilizing the bargaining relationship.[12]

Further, where employee rejection of the union in an employer poll can be traced to the deficiencies in such polls identified above, reliance on the result would interrupt a bargaining relationship where that relationship would not have been interrupted by a Board election. And, while the union could thereafter file for a Board election (with an adequate showing of support), the status quo would have changed. The union would no longer be able to demonstrate its usefulness by providing repre-

[12] An employer who required employees to participate in a poll each and every year as to whether they wanted to continue union representation would, for these reasons among others, surely violate § 8(a)(1).

sentation to employees on the shop floor, and employees would no longer be in daily contact with the union. Any incumbent who loses an election is in a much weaker position in any subsequent election by reason of having lost the incumbency. Thus, a union once ousted is less likely to prevail in a later Board-conducted election, even if the union would have prevailed initially under the Board's more neutral and more accurate procedures.

C. Given the primacy of Board elections in the statutory scheme and the dangers to the employees' right of self-organization and to the stability of bargaining relationships posed by employer polls on the continuing majority support of an incumbent union, the Board's current rule regarding polling is both reasonable and consistent with the Act.

The Board's rule limits polling with regard to incumbent unions to the narrow—but no means insignificant—situation in which an employer has sufficient evidence to sustain a reasonable belief that a majority of its employees no longer desire union representation. Absent a poll, an employer considering whether to withdraw recognition has only such informal communications regarding majority support as employee statements and employee petitions. There is an inherent ambiguity about such statements, as the controversy in this case and many others regarding the meaning to be attributed to employee statements illustrates. In particular, when the statements are made to the employer, employees may well have reason to avoid revealing pro-union sentiment, and may speak in well-measured terms.[18] Nor can an employer presented with an anti-union petition or letters be certain that the signatures are genuine, or that the petition was not the result of group pressure.

[18] The circumstances of this case well illustrate this problem: Some of the statements the Employer relies upon as indicating anti-union sentiment by employees were made in hiring interviews with an Employer who had indicated an intention to operate non-union. Under those circumstances, it is not surprising that the employees would conclude that in order to get a job, it would be wise to convey the impression that they would not support union representation.

Because of these concerns an employer may poll as a check on the possibility that the expressions of employee sentiment on which the employer is prepared to act are unreliable, if not for his own legal safety then only to minimize the possibility of a new organizing campaign, as employees come to the judgment that the employer's action was hasty and ill-considered.

It may well be that the employer who is sufficiently concerned about ascertaining the real desires of its employees concerning continued union representation is rare, and that most employers faced with sufficient evidence to meet the Board's standards for withdrawal of recognition will take that step without going further to double check the accuracy of their information and the depth of their employees' feelings. But the Board is not obliged to tailor its administration of the Act so as to foster the interests of employers who wish to discourage union representation, to treat the more scrupulous employers as if they do not exist, or to make polling broadly permissible because it is sometimes permissible. And, for all the reasons surveyed above, the Board certainly has no obligation to foster unilateral employer withdrawals of recognition without a formal decertification election by making it easier for an employer to trigger an employer poll than a Board election.

It is worth noting as well that where a majority of the employees have indicated a lack of continued support for union representation, the special dangers of employer polls are somewhat mitigated. Under those circumstances, it is likely that the poll would be regarded by employees as addressed to an issue that the employees themselves have raised, rather than as an employer-instigated suggestion that the union be ousted. And, where a majority of the employees in the unit have affirmatively given some indication that they no longer want the union in the plan.,

it is likely that the bargaining relationship is already impaired, and that the poll itself will not cause the impairment.

In contrast, a Board rule allowing polling on a lesser showing of a loss of majority employee support, however phrased, would allow employers to seize on short-term fluctuations in the union's popularity parallel to the short-term fluctuations that show up in nearly all political approval polls. And, where the employer has no reasonable belief that the union has permanently lost the support of a majority of the work-force, any legitimate interest the employer has in ascertaining its employees' views disappears entirely, and the poll becomes nothing more than direct employer interference in employee self-organization.

C. We would be the last to claim that the Board's present set of rules governing employer withdrawal of recognition from incumbent unions is without flaws. But, as the Court of Appeals suggested (83 F.3d at 1347), the *most* congent criticism of the Board's incumbent union polling policy is not that it gives too little room to employer self-help through employer polls and unilateral withdrawals of recognition, but that it gives *far more room* for such self-help than the Board's own rationale would support. The Board could well—and in our view should—conclude that the various considerations favoring Board-supervised elections as a way to end employer bargaining obligations indicate that unilateral employer withdrawals of recognition—and polls as a way-station to such withdrawals—should both be entirely outside the pale. Indeed, now that the Board, with this Court's approval, has concluded in *Linden Lumber*, *supra*, that employers may insist upon Board-conducted elections before entering into a bargaining relationship, we can, to paraphrase *Celanese*, *supra*, "find no reason in law or policy which calls for the conclusion that a good faith doubt of

majority is [a] defense to a refusal to bargain after the certificate year [but not] . . . in cases where there is no certificate."

That the Board has chosen to provide a limited privilege for employers seeking to end a bargaining relationship to act without using the Board's processes, rather than no privilege at all, is hardly an appropriate basis for judicial imposition of a different rule *expanding*—rather than contracting—the availability of employee polling as a means of testing continuing employee majority support of their union. "There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organization freedom." *Auciello*, *supra*, 116 S. Ct. at 1760.[14]

[14] For related reasons, the Employer's various complaints about the manner in which the Board conducts RM elections—including the claims that the standard applied for determining whether the employer has raised a "question concerning representation" is too high, and the Board's blocking charge rules may preclude holding an election in a timely manner—are not relevant to the present case, and should not affect its outcome. If the Board's processes for holding RM elections are faulty (which we do not think they are in the respects the Employer maintains), then those defective RM election processes should be corrected. The Board's conclusion that employer polls threaten employee § 7 rights unless closely confined to a narrow range of situations cannot be held unreasonable or contrary to law on the basis that the Board could do better in running its own, statutorily-mandated elections.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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